

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 18 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0203
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MARK A. PAYAN,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900870

Honorable James L. Conlogue, Judge

AFFIRMED

Janelle A. McEachern

Chandler
Attorney for Appellant

K E L L Y, Judge.

¶1 Mark Payan appeals from the trial court's April 2010 order revoking his probation and sentencing him to a presumptive prison term of 1.5 years. Counsel has filed a brief citing *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), avowing she has reviewed the entire record and found no

arguable question of law to raise on appeal. She asks this court to search the record for fundamental error. Payan has not filed a supplemental brief.

¶2 Viewed in the light most favorable to upholding the court’s finding of a probation violation, *see State v. Vaughn*, 217 Ariz. 518, n.2, 176 P.3d 716, 717 n.2 (App. 2008), the evidence established the following. Pursuant to a plea agreement, Payan was convicted of attempted aggravated driving with a drug or its metabolite in his body while his driver license was suspended, canceled, revoked or restricted. On January 25, 2010, the trial court suspended imposition of sentence and placed Payan on three years’ supervised probation. That same day, Payan acknowledged receipt of the written conditions of his probation, which included the condition that he “[o]bey all laws.”

¶3 On February 5, 2010, police officers investigating a reported fight apprehended Payan, who kicked and swung his arms against their restraint and, after delivering a “head-strike” to one of the officers, told him, “I am going to kill you.” Payan’s probation officer filed a petition to revoke probation based on this conduct.¹ After a hearing, the trial court found the state had sustained its burden of showing Payan had violated his probation by resisting arrest and by threatening, intimidating, and assaulting a police officer. The court revoked Payan’s probation and sentenced him to a presumptive term of 1.5 years’ imprisonment.

¶4 A probation violation may be established by a preponderance of the evidence, Ariz. R. Crim. P. 27.8(b)(3), and we will uphold a trial court’s finding of a

¹Although the petition for revocation had alleged the violations had occurred on “February 5, 2009,” the state told the trial court at the violation hearing that this had been a typographical error, and the evidence supported that clarification.

violation “unless it is arbitrary or unsupported by any theory of evidence,” *State v. Moore*, 125 Ariz. 305, 306, 609 P.2d 575, 576 (1980). The court’s findings here were supported by the evidence, the proceedings were conducted in accordance with the law, and the sentence imposed upon revocation of Payan’s probation was within the range authorized. *See* A.R.S. §§ 13-702(D); 13-1001(C)(4); 28-1381(A)(3); 28-1383(A)(1),(L)(1). In our examination of the record pursuant to *Anders*, we have found no reversible or fundamental error and no arguable issue warranting further appellate review.

¶5 Accordingly, we affirm the trial court’s findings of probation violation, its revocation of Payan’s probation, and the sentence imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge